

#### § 5.44

agent for service, or otherwise authorized to accept on behalf of its employees, any subpoenas, show-cause orders, or similar compulsory process of federal or state courts, or requests from private individuals or attorneys, which are not related to the employees' official duties except upon the express, written authorization of the individual Department employee to whom such demand or request is directed.

(d) Acceptance of such documents by the Office of the General Counsel does not constitute a waiver of any defenses that might otherwise exist with respect to service under the Federal Rules of Civil or Criminal Procedure or other applicable rules.

(e) Copies of any subpoenas, show cause orders, or similar compulsory process of federal or state courts, or requests from private individuals or attorneys, directed to former employees of the Department in connection with legal proceedings arising out of the performance of official duties shall also be served upon the Office of the General Counsel. The Department shall not, however, serve as an agent for service for the former employee, nor is the Department otherwise authorized to accept service on behalf of its former employees. If the demand involves their official duties, former employees who receive subpoenas, show cause orders, or similar compulsory process of federal or state courts should also notify in the component of the Department in which they were employed if the service involves their official duties while so employed.

(f) If the subpoena, demand, or other request is nonetheless delivered to the employee, the employee shall immediately forward a copy of that document to the Office of the General Counsel.

#### **§ 5.44 Testimony and production of documents prohibited unless approved by appropriate Department officials.**

(a) No employee, or former employee, of the Department shall, in response to a demand or request, including in connection with any litigation, provide oral or written testimony by deposition, declaration, affidavit, or otherwise concerning any information ac-

#### **6 CFR Ch. I (1–1–08 Edition)**

quired while such person is or was an employee of the Department as part of the performance of that person's official duties or by virtue of that person's official status, unless authorized to do so by the Office of the General Counsel, or as authorized in § 5.44(b).

(b) No employee, or former employee, shall, in response to a demand or request, including in connection with any litigation, produce any document or any material acquired as part of the performance of that employee's duties or by virtue of that employee's official status, unless authorized to do so by the Office of the General Counsel or the delegates thereof, as appropriate.

#### **§ 5.45 Procedure when testimony or production of documents is sought; general.**

(a) If official information is sought, through testimony or otherwise, by a request or demand, the party seeking such release or testimony must (except as otherwise required by federal law or authorized by the Office of the General Counsel) set forth in writing, and with as much specificity as possible, the nature and relevance of the official information sought. Where documents or other materials are sought, the party should provide a description using the types of identifying information suggested in § 5.3(b). Subject to § 5.47, Department employees may only produce, disclose, release, comment upon, or testify concerning those matters which were specified in writing and properly approved by the appropriate Department official designated in § 5.44. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). The Office of the General Counsel may waive the requirement of this subsection in appropriate circumstances.

(b) To the extent it deems necessary or appropriate, the Department may also require from the party seeking such testimony or documents a plan of all reasonably foreseeable demands, including but not limited to the names of all employees and former employees from whom discovery will be sought, areas of inquiry, expected duration of proceedings requiring oral testimony, and identification of potentially relevant documents.

## Office of the Secretary, DHS

## § 5.48

(c) The appropriate Department official designated in § 5.42 will notify the Department employee and such other persons as circumstances may warrant of its decision regarding compliance with the request or demand.

(d) The Office of the General Counsel will consult with the Department of Justice regarding legal representation for Department employees in appropriate cases.

### **§ 5.46 Procedure when response to demand is required prior to receiving instructions.**

(a) If a response to a demand is required before the appropriate Department official designated in § 5.44 renders a decision, the Department, if necessary, will request that the Department of Justice or the appropriate Department attorney take appropriate steps to stay, postpone, or obtain relief from the demand pending decision. If necessary, the attorney will:

(1) Appear with the employee upon whom the demand has been made;

(2) Furnish the court or other authority with a copy of the regulations contained in this subpart;

(3) Inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the appropriate Department official; and

(4) Respectfully request the court or authority to stay the demand pending receipt of the requested instructions.

(b) In the event that an immediate demand for production or disclosure is made in circumstances which would preclude the proper designation or appearance of a Department of Justice or appropriate Department attorney on the employee's behalf, the employee, if necessary, shall respectfully request from the demanding court or authority for a reasonable stay of proceedings for the purpose of obtaining instructions from the Department.

### **§ 5.47 Procedure in the event of an adverse ruling.**

If a stay of, or other relief from, the effect of the demand in response to a request made pursuant to § 5.46 is declined or not obtained, or if the court or other judicial or quasi-judicial authority declines to stay the effect of

the demand in response to a request made pursuant to § 5.46, or if the court or other authority rules that the demand must be complied with irrespective of the Department's instructions not to produce the material or disclose the information sought, the employee upon whom the demand has been made shall respectfully decline to comply with the demand, citing this subpart and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

### **§ 5.48 Considerations in determining whether the Department will comply with a demand or request**

(a) In deciding whether to comply with a demand or request, Department officials and attorneys shall consider, among any other pertinent considerations:

(1) Whether such compliance would be unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand arose;

(2) Whether compliance is appropriate under the relevant substantive law concerning privilege or disclosure of information;

(3) The public interest;

(4) The need to conserve the time of Department employees for the conduct of official business;

(5) The need to avoid spending the time and money of the United States for private purposes;

(6) The need to maintain impartiality between private litigants in cases where a substantial government interest is not implicated;

(7) Whether compliance would have an adverse effect on performance by the Department of its mission and duties; and

(8) The need to avoid involving the Department in controversial issues not related to its mission.

(b) Among those demands and requests in response to which compliance will not ordinarily be authorized are those with respect to which any of the following factors, *inter alia*, exist:

(1) Compliance would violate a statute or a rule of procedure;

(2) Compliance would violate a specific regulation or Executive order;